

S  
328  
L13  
1973

S  
328.3  
L13  
1973

STATE DOCUMENTS

JAN 9 1974

STATE DOCUMENTS COLLECTION

MONTANA STATE LIBRARY  
530 E. LYNDAL  
HELENA, MONTANA 59601

INTERIM STUDY BY THE  
SUBCOMMITTEE ON  
CONSTITUTION, ELECTIONS AND FEDERAL RELATIONS

RIGHT TO KNOW  
RIGHT TO PARTICIPATE

December 1973

PLEASE RETURN

Montana Legislative Council  
State Capitol  
Helena, Montana

MONTANA STATE LIBRARY  
990 East Lyndale Avenue  
Helena, Montana 59601



Membership  
Subcommittee on  
Constitution, Elections and Federal Relations

SENATE

Jack McDonald,  
Chairman  
Antoinette Rosell,  
Vice Chairman  
Harry T. Northey  
A. A. Zody

HOUSE

Mike Greely  
Tom Haines  
Hal Harper  
Al Kosena

Montana Legislative Council:

Researcher, Peter M. Meloy  
Executive Director, Mrs. Rose Weber  
Chairman, Senator Carroll Graham



## TABLE OF CONTENTS

|                                                                       | <u>Page</u> |
|-----------------------------------------------------------------------|-------------|
| SENATE JOINT RESOLUTION NO. 1 . . . . .                               | 1           |
| THE RIGHT OF PARTICIPATION. . . . .                                   | 4           |
| RIGHT TO KNOW . . . . .                                               | 6           |
| Statutes Permitting Closed Meetings. . . . .                          | 8           |
| Statutes Protecting Documents Concerning Natural<br>Persons . . . . . | 9           |
| THE STATUTES PROTECTING THE RECORDS OF NATURAL<br>PERSONS. . . . .    | 10          |
| Statutes Protecting Documents Pertaining to<br>Corporations. . . . .  | 12          |
| THE STATUTES PROTECTING THE RECORDS OF CORPORATION. . . . .           | 16          |
| CONCLUSION. . . . .                                                   | 17          |
| APPENDIX 1. . . . .                                                   | 18          |
| APPENDIX 2. . . . .                                                   | 23          |
| APPENDIX 3. . . . .                                                   | 26          |
| APPENDIX 4. . . . .                                                   | 29          |



## SENATE JOINT RESOLUTION NO. 1

A JOINT RESOLUTION OF THE SENATE AND THE HOUSE OF REPRESENTATIVES OF THE STATE OF MONTANA REQUESTING THE LEGISLATIVE COUNCIL TO CONDUCT A STUDY OF THE PROBLEMS INVOLVED IN THE 1972 MONTANA CONSTITUTION IN ARTICLE II, SECTION 8, "RIGHT OF PARTICIPATION", AND SECTION 9, "RIGHT TO KNOW", CONCERNING THE VARIOUS FUNDAMENTAL CITIZENS' RIGHTS INVOLVED, AND REPORT ITS FINDINGS TO THE SECOND SESSION OF THE FORTY-THIRD LEGISLATIVE ASSEMBLY TOGETHER WITH DRAFT LEGISLATION.

WHEREAS, the legislative assembly has the ultimate duty to implement the 1972 Montana constitution with well-researched and well-considered legislation, and

WHEREAS, research and drafting of legislation providing for fundamental citizens' rights concerning the new and expanding rights of participation and to know should be accomplished only after careful and considered reflection prior to its presentation for adoption.

NOW, THEREFORE, BE IT RESOLVED BY THE SENATE AND THE HOUSE OF REPRESENTATIVES OF THE STATE OF MONTANA:

That the legislative council is requested to conduct a detailed study leading to draft legislation implementing article II, sections 8 and 9 of the 1972 Montana constitution.

BE IT FURTHER RESOLVED, that a report and draft legislation be prepared and submitted to the second session of the forty-third



legislative assembly.



This section contains proposed legislation with explanatory material implementing Article II, Sections 8 and 9 of the 1972 Montana Constitution, "The Right of Participation" and "The Right to Know."

SJR 1 directs the Legislative Council "to conduct a detailed study leading to draft legislation implementing Article II, Sections 8 and 9 of 1972 Montana Constitution."

The Constitutional Implementation Committee prior to the 1973 Session recommended the study because the new "Right to Participate" and the new "Right to Know" had expanded citizen's rights and these rights affected many existing statutes. The committee indicated in SJR 1 that "Drafting of legislation ... should be accomplished only after careful and considered reflection prior to its presentation for adoption."

This Resolution was assigned by the Priorities Committee to the subcommittee on Constitution, Elections and Federal Relations. The following is an explanation and background which led to the implementing legislation contained in the appendices. This legislation will be introduced by members of the subcommittee.



## THE RIGHT OF PARTICIPATION

Section 8, Article II of the 1972 Constitution reads:

The public has the right to expect governmental agencies to afford such reasonable opportunities for citizen participation in the operation of the agencies prior to the final decision as may be provided by law.

This is the only provision in the Bill of Rights which includes the phrase "as may be provided by law." This phrase is generally used when there is a constitutional expectation that the legislature has or will act to implement a provision. Chairman Dahood, of the Bill of Rights Committee, made the following explanation of the provision during its formal debate:

I think we are laying down a particular principle. We want the legislature to implement it. I am not prepared to say there is not a self-executing facet to it as well. If the legislature did not do anything about it at all, perhaps if some decision were made without giving notice, without giving a citizen a chance to participate, I think that citizen could contend that there was an unconstitutional legislative activity. But, we have faith in the legislature. We think the legislature when it is formed after the new Constitution takes effect is going to look at this particular section. We think they are going to do something about it.

(Debates of the Constitutional Convention, page 5091; and hereafter referred to as "Debates")

Further discussion on the floor of the convention suggests how far the convention expected the legislature to go in implementing this provision.

Delegate Dahood, in rather general language, told the convention how he expected the legislature to implement the section:

What we were trying to express in this particular section was that the legislature would do everything possible which is reasonable and feasible to allow the citizen to know that some decision is about to be made, that if the citizen wants to voice an opinion with respect to that decision that they are going to be given not only a reasonable opportunity but a feasible one -- one that provides them with easier access to approach that particular agency so that they can make their particular opinion known ... (Debates, page 5090)

More specific guidance as to which agencies the Convention was directing its "Right of Participation" was provided by Delegate McNeil when he successfully moved to insert the word "agencies"



in the provision. When asked the question of what is a government agency, Delegate McNeil explained:

I think it is what the Committee intended to reach with this and that is appointive commissions, bureaus, and so forth, to the exclusion of the judiciary and the legislature ... (Debates, page 5137)

The tenor of the debate indicates that the right of participation should be extended to those "agencies" which function to carry out laws set down by legislative bodies. These boards exist at all levels of government. The purpose is to involve citizens in the decision making process of those agencies making decisions which have the force of law, as opposed to the sorts of decisions which do not affect anyone's rights or privileges.

Delegate Romney moved to replace the existing provision with a more specific phrase which was rejected because it was statutory-type language:

Citizens shall possess the right to attend meetings of governmental units charged with the responsibility of administration of statutes and regulations. Such attendance shall guarantee hearing the deliberations at meetings, view the proceedings, and accept the invitation to offer suggestions. (Debates, page 5134)

Delegate Romney's language was more relevant for legislative implementation and bears consideration by the legislature in carrying out its mandate.

Prior to adoption of the new "Right to Participate" the legislature adopted the Administrative Procedures Act (A.P.A.) which was designed to make uniform all procedures and rules utilized by the state administrative agencies. This did afford a better opportunity for citizen access and input to certain administrative decisions.

However, the A.P.A. is rather restrictive in scope. Certain agencies are excluded from the act. The contested case procedures are quite formal necessitating in most instances representation by attorneys. Most importantly, the A.P.A. does not address itself to all "Final Decisions" of state agencies.

The new constitutional "Right to Participate" demands a much broader opening of administrative doors. It provides that the public has the right to expect governmental agencies to afford reasonable opportunities for citizen participation in the operation of the agencies prior to "the final decision ..."

This new right is not limited to certain "agencies" or certain "final decisions." It is, however, a broad constitutional dictate and must be given more specific meaning by legislative implementation.



The Federal Water Pollution Control Act, (33 U.S.C. 1251) required the Environmental Protection Agency (E.P.A.) to adopt guidelines to provide for citizen participation "to the fullest extent practicable" in the decisions carried out by E.P.A. under the act. E.P.A. promulgated rather detailed guidelines to assure maximum participation. Since these guidelines are quite lengthy and detailed they should not be included in the implementation legislation. Rather, a dictate in the statute that agencies shall adopt guidelines to assure participation should be sufficient to require rules similar to those adopted by E.P.A. Those rules are included with the bill in Appendix 1.

The transcripts of the debates do not provide much guidance to the specific meaning of certain key words in the "Right." The general thrust of the section is clear and, most certainly, it is clear that the convention intended the legislature to provide specific meaning. Chairman Dahood simply phrased this intent as follows:

I think the language of the Committee as it is before you now without amendment is going to require that there be uniform rules and regulations set by the legislature with respect to citizen participation. (Debates, page 5103)

A bill which would provide "uniform rules and regulations ... with respect to citizen participation" should have the following elements:

1. Definition of governmental entities which shall insure citizen participation under this right.
2. A method of assuring adequate notice so that citizens may know a decision is about to be made.
3. The extent to which "citizen participation in the operation of the agencies" is to be permitted.

These elements are included in the bill found in Appendix 1.

#### RIGHT TO KNOW

Section 9, Article II of the 1972 Constitution reads:

No person shall be deprived of the right to examine documents or to observe the deliberations of all public bodies or agencies of state government and its subdivisions, except in cases in which the demand of individual privacy clearly exceeds the merits of public disclosure.

Again, as with the "right to participate" this is a novel



provision among American constitutions. There is virtually no legal precedent which one can consult in an attempt to interpret the meaning of the provision. The only meaningful source of intent or meaning is found in the debates of the Convention. A discussion of the constitutional intent as set down in the debates will follow.

First, however, it is necessary to look to the plain meaning of the language used by the Convention. It appears that the provision contemplates two ideas:

1. No person shall be deprived of the right to examine documents or to observe the deliberations of all public bodies or agencies of state government and its subdivisions, and
2. Except in cases in which the demand of individual privacy clearly exceeds the merits of public disclosure.

Taken alone, the right to know language (as stated in 1., above) in this section is a relatively broad prohibition against secreting documents or closing meetings of public bodies. It applies to the broadest spectrum of governmental entities and their subdivisions. Any statute, rule, regulation or decision by a governmental entity which deprives a person of this right would be untenable and invalid in the face of this provision.

However, this provision is qualified by a right of individual privacy (as stated in 2., above). Since the Convention had created a constitutional right of privacy in the following section (Section 10, Article II) it was necessary to resolve this "right to know" provision with the "right of privacy." Normally, these two provisions would be in conflict. "The right to know" part of the section permits disclosure of certain documents in the custody of a governmental entity or the opening of a meeting, both of which could relate to private individuals. The "right of privacy" part of the section would seem to protect those documents or authorize a non-public meeting.

In order to resolve this potential conflict, the Convention attached to the end of the "right to know" the proviso which qualifies and limits the scope of the section as it applies to individual privacy. This proviso permits a closed meeting or protects documents "in cases in which the demand of individual privacy clearly exceeds the merits of public disclosure."

On its face, the provision would place with the chairman of the meeting or the custodian of the documents the initial responsibility and burden of determining whether the demands of individual privacy were clearly exceeded such that the meeting could be closed or the documents withheld from public scrutiny. However, the legislature can carry part of this burden. There is no inherent prohibition in the section itself against any statute or regulation which deprived a person of the right to



observe public deliberations or documents as long as (1) the statute or rule was consistent with the proviso protecting individual privacy and (2) authorized a case by case determination as to whether the demands of individual privacy exceeded the merits of disclosure.

In fact, the legislature has over the years enacted a number of statutes rendering certain public documents confidential and permitting certain closed meetings.

Acting with this knowledge in mind, the Legislative Committee on Constitutional Implementation recommended that these statutes be examined individually to determine whether they are valid in view of the new constitutional provision.

These statutes can be divided into three categories: (1) those that authorize closed meetings, (2) those that protect documents in the custody of a public body which relate to individual people, and (3) those that protect documents in the custody of a public body which relate to corporations.

#### Statutes Permitting Closed Meetings

There are two statutes which authorize closed meetings, Section 75-6127 and Section 82-3402.

Section 75-6127 permits school boards to close a meeting in which professional negotiating proposals are discussed prior to the actual professional negotiating session. It should be noted that this statute does not authorize closure of the negotiating session itself, but merely a meeting in which negotiating proposals are discussed prior to the negotiating session.

When examining this statute in the light of "the right to know" it is difficult to justify the statute as an exception. The constitutional mandate declares "No person shall be deprived of the right to observe the deliberations of public bodies unless the demands of individual privacy clearly exceed the merits of public disclosure." A discussion of professional negotiating proposals does not even involve the kind of individual privacy contemplated by the exception, let alone exceeding the merits of public disclosure.

It appears that this statute clearly violates the "right to know" and should be repealed.

The other section relating to open meetings is Section 82-3402. This statute declares that all meetings shall be open unless a particular issue, stated in the statute, is to be discussed. A public body may close a meeting if it is going to discuss a question relating to:

1. National or state security;
2. Disciplining of a public officer or employee;
3. Employment, appointment, promotion, dismissal, demotion or resignation of any public officer or employee.
4. Purchasing of public property, investing of public funds which might adversely affect the public secur-



ity or financial interest of state or political subdivision of the state;

5. Revocation of a license of any person licensed under the state;
6. Law enforcement, crime prevention probation or parole.

Items one and four do not in any way relate to individual privacy. The exception to the prohibition against closing meetings would not apply in these cases. The items, then, are clearly unconstitutional.

Items two, three, five and six involve situations which most likely would be concerned with a question of individual privacy. However, each individual case would have to be examined to determine whether:

1. The case involved a question of individual privacy, and
2. whether the demands of individual privacy clearly exceeded the merits of public disclosure.

The meeting holder is not required to make the determination in 2, and the constitutional provision requires this determination to be made before a meeting may be closed.

A statute could be devised to accomplish the intent of §82-3402. It should state parameters within which the "right to know" is effectuated while requiring the balancing test to guarantee individual privacy. The statute should have the following elements:

1. A definition of what constitutes a "deliberation."
2. A method of enforcing the provision.
3. A general statement authorizing the body holding the meeting to make a determination whether the demands of individual privacy exceed the merits of public disclosure with court review of the decision.

The draft bill in Appendix 2 implements these three elements.

#### Statutes Protecting Documents Concerning Natural Persons

Again, as with the closed meeting statutes, the legislature has prescribed a series of laws protecting individual records which are in the custody of the state. These statutes all could come within the exception. That is, they deprive a person of the right to examine a document which does relate to individual privacy.

However, they do not permit the custodian of the documents to make the constitutionally required determination, that the demands of individual privacy clearly exceed the merits of public disclosure. To that extent, then, the statutes have constitutional problems.



These problems could be resolved in two ways:

1. A legislative policy statement could be attached to each section declaring that the documents were protected because the demands of individual privacy are not exceeded by the merits of public disclosure in all cases. This statement could be used to legally protect the statute against the "right to know."
2. All of the statutes could be repealed and replaced by a short legislative prescription containing the following elements:
  - A. A definition of a document which is to be protected.
  - B. A method of enforcing the "right to know."
  - C. A statement authorizing the custodian of the documents to make a determination whether the demands of individual privacy are not clearly exceeded by the merits of public disclosure with judicial review. The draft bill in Appendix 3 implements these elements and repeals the existing statutes.

The existing statutes protecting documents concerning natural persons are as follows:

THE STATUTES PROTECTING  
THE RECORDS OF NATURAL PERSONS

- |           |                                                                                                                                                                                                                                                                           |
|-----------|---------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|
| 7-147     | Protects records of individual borrowers of building and loan associations. (\$500 fine 2 to 5 years in prison.)                                                                                                                                                          |
| 10-703    | Records of minor children and adopting parents must be kept confidential. (No fine)                                                                                                                                                                                       |
| 32-1213   | Protects accident reports required under the uniform accident reporting act as well as of financial responsibility statements submitted to Highway Patrol Board may be examined by any person involved in an accident, or his attorney, or his executor or administrator. |
| 32-1215   | Protects accident reports required by municipal ordinance -- confidentiality made it inadmissible evidence --                                                                                                                                                             |
| 32-3925   | Protects financial statements and income tax returns which are submitted to Highway Commission in determining compensation for relocating condemnee.                                                                                                                      |
| 36-203(7) | All District Court proceedings under family conciliation statutes are closed.                                                                                                                                                                                             |
| 36-203(7) | Protects all files of conciliation court.                                                                                                                                                                                                                                 |



- 40-5511(2) Protects identity of lender if he is providing the source of consideration for the merger of an insurance holding company more in the ordinary course of business.
- 41-803 Permits the Director of Vocational Rehabilitation to promulgate regulations governing the protection of records and confidential information.
- 48-139 Protects marriage applications and pre-marital lab reports.
- 61-213 Protects all files and records relating to adoption proceedings.
- 69-4115 Protects data accumulated by Board of Health on infant morbidity and mortality as it relates to individuals under study.
- 69-4610 Protects information concerning VD.
- 69-5218 Protects hospital records received by the Board of Health to the extent that they specifically identify individuals.
- 69-6301 Protects information relating to treatment of hospital patients made available to in-hospital medical staff committees.
- 69-6303 Protects written documents related to professional training, supervision or discipline of the medical staff of hospitals.
- 71-406 Protects information relating to applications for old age assistance as it relates to each applicant.
- 71-506 Protects information relating to applications for aid to dependent children as it relates to each applicant and the child.
- 71-607 Protects information relating to applications for aid to needy blind as it relates to each applicant.
- 71-1207 Protects information relating to applications for aid to disabled persons as it relates to each applicant.
- 71-1403 Permits supervisor of services to the blind to make regulations governing the protection of records and confidential information.
- 71-1520 Protects information relating to applicants for economic opportunity and poverty relief as it relates to the applicant.



- 71-1523      Protects application information on records concerning welfare applicants.
- 87-124       Protects information relating to individuals covered by unemployment compensation laws. -- (Fine of from \$20 to \$200 or imprisoned for not more than 90 days.)
- 92-809       Protects information furnished the Workman's Compensation Division by an employer or insurer relative to an employee. (Misdemeanor)
- 92-1348      Protects information furnished the Workman's Compensation Division by an employer or insurer relative to an employee covered by the Occupational Disease Act.
- 94-9824      Protects social records pre-sentence reports, pre-parole reports and supervision records of individuals appearing before parole boards.
- 95-2205      Protects reports relating to pre-sentence investigations of criminals.

#### Statutes Protecting Documents Pertaining to Corporations

The third type of statute which deprives a person of the right to examine documents in the custody of a public body relates to certain documents containing corporate information required by state statute.

This information in each case is necessary for enforcement of the appropriate corporate regulatory laws prescribed by the legislature with regard to certain types of businesses.

The Attorney General has issued an opinion interpreting the word "individual" in the "right to know" provision as it relates to corporations. Opinion No. 19, Volume 35 holds that "the word 'individual' in Section 9 refers to corporate privacy as well as a natural person's privacy." (p.4) On the basis of this determination, he upholds the constitutionality of the confidentiality provision of the Hard Rock Mining Act. (The opinion is reproduced in Appendix 4.)

This confidentiality provision is typical of the other statutes protecting corporate records. The opinion is, therefore, quite far-reaching and bears critical inspection.

While the Attorney General points out the authority, indeed widespread, that a legislature will be presumed to have acted within its constitutional limitations, he does not take up the critical question of the effect of a new constitution on previously enacted statutes, where legislative intent is irrelevant. The case of



Criswell v. Montana Central Railway Co., 18 Mont. 167, 44 P. 525 (1896) interpreted the effect of the 1889 Constitution on a previously valid 1873 statute. The court said that the transition schedule of the constitution (similar to section 6 of the transition schedule of the new constitution) operated as an effective repeal of statutes clearly in conflict with the constitution.

Where the Hard Rock Mining Act was enacted in 1971 and the constitution ratified in 1972, and the new constitution created a relationship between the right to see public records and the right of privacy which relationship was not treated in the old constitution, it is difficult to see how the Attorney General can argue that the legislature was able to balance these two rights in 1971.

The only authority actually cited by the Attorney General for the proposition that the noun "individual" sometimes means a corporate person as well as a natural person is an old Ohio case.

The Ohio court was construing a statute which regulated telephone companies when they electronically transmitted messages to other telephone companies, and "to and from any individual." In this context, a business firm subscribing to telephone service was within the scope of interests protected by the statute.

In that particular case, the context did indicate that the word "individual" should have other than its ordinary meaning. Having established this point, the Attorney General devotes no analysis at all to the context of our constitutional article. A detailed analysis would consider the ways in which the adjective "individual" and the noun "privacy" illuminate one another when used together.

One important line of cases has developed around perhaps the most fundamental right of privacy, the privilege against self-incrimination guaranteed by the Fifth Amendment of the U. S. Constitution. It reads, "nor shall (a person) be compelled in any criminal case to be a witness against himself."

When the government began criminal anti-trust prosecutions of corporations and sought to subpoena evidence of violations, the corporations claimed the privilege against self-incrimination. The Supreme Court in 1911 held that a clear distinction existed between individual persons and corporate persons in this context:

(T)here is a clear distinction in this particular between an individual and a corporation. The individual may stand upon his constitutional rights as a citizen. He is entitled to carry on his private business in his own way. His power to contract is unlimited. He owes no duty to the state or to his neighbors to divulge his business, or to open his doors to an investigation, so far as it may tend to crimin-



ate him. He owes no such duty to the state, since he receives nothing therefrom, beyond the protection of his life and property ...

Upon the other hand, the corporation is a creature of the state. It is presumed to be incorporated for the benefit of the public. It receives certain special privileges and franchises, and holds them subject to the laws of the state and the limitations of its charter ... While an individual may lawfully refuse to answer incrimination questions unless protected by an immunity statute, it does not follow that a corporation, vested with special privileges and franchises, may refuse to show its hand when charged with an abuse of such privileges. *Hale v. Henkel*, 211 U.S. 43, 74-75 (1906)

This rule has been followed many times, *Wilson v. U.S.*, 221 U.S. 361, *U.S. v. Bausch & Lomb Co.*, 321 U.S. 707, *Curcio v. U.S.*, 354 U.S. 118 (1957), and in western state courts, *Brovelli v. Superior Court*, 56 Cal. 2d 524, 365 P. 2d 462 (1961), *State v. Mecca Twin Theatre and Film Exchange, Inc.*, 82 Wash. 2d 87, 507 P. 2d 1165 (1973; a pornography prosecution).

The debates of the 1972 Montana Constitutional Convention make it even clearer that the "right to know" was subject to the privacy rights of natural persons as opposed to corporations.

The statements of Delegate Dahood, the Chairman of the Bill of Rights Committee, which authored the provision, clearly indicate that the section's right to privacy was meant for natural persons and not corporations.

In opposition to a motion to strike the entire section, Delegate Dahood explained the section:

"And the two purposes behind this section, as are the basic purposes behind the federal amendment contained within the Bill of Rights that provides freedom of the press, are two-fold; one-- to allow the press to be a watchguard on the activity of government and, second, to make sure that the rights of the individual citizen of a free democracy are protected, and that is the only justification for a free press in a democratic society ....

Most laudable, indeed, to balance the need to know with the need to have the press act as a watchguard upon government. Balance that with the basic right of individual dignity and privacy in the type of governmental structure which we have and which we enjoy." (Emphasis supplied). Constitutional Convention Debates Pages 5158-5161.

Later, on the same day, in the debates the following dialogue occurred:



CHAIRMAN GRAYBILL: Very well, members of the committee, you have before you for your consideration, upon the recommendation of Mrs. Eck, that when this committee does arise and report, after having had under consideration section nine of the Bill of Rights article, that it recommend the same be adopted. Mr. Heliker, for what purpose do you arise?

DELEGATE HELIKER: I would like to ask Mr. Dahood a question.

CHAIRMAN GRAYBILL: O. K. Mr. Dahood.

DELEGATE DAHOOD: I yield, Mr. Chairman.

DELEGATE HELIKER: Mr. Dahood, being an ignorant non-lawyer, what is an individual?

DELEGATE DAHOOD: What is an individual?

DELEGATE HELIKER: Is it by any chance also a corporation?

DELEGATE DAHOOD: A person can, Dr. Heliker, as you well know, be defined to include a corporation under the law.

DELEGATE HELIKER: I know a person can, but can an individual?

DELEGATE DAHOOD: An individual in my judgment would not be a corporation, no.

DELEGATE HELIKER: Thank you.

(Emphasis supplied.) Debates, page 5178.

In this case, the Chairman of the Bill of Rights Committee, speaking on behalf of the committee and the "right to know" provision, was asked the very question which Mr. Schwinden asked the Attorney General. Mr. Dahood, as he did throughout the debates on the section, very clearly defined what was meant by the word "individual." And suggested, in essence, that if corporations were to be given a protection of the right of privacy, the Convention would have used the word "person."

Again in a later discussion of the same section, Delegate Dahood declares:

The right of individual privacy announced in this section, intentionally limited to individual privacy so as to preclude a government agency or corporation claiming the right, is intended to curtail disclosure insofar as it is established by the legislature and/or the courts that the demands of such privacy clearly exceed the merits of public disclosure. (Emphasis supplied.) Debates of the Constitutional



It is clear when one examines constitutional intent that a special right of privacy was not to be extended to corporations within the contemplation of Section 9, "The Right to Know."

Further, when read in conjunction with the transition article and the *Criswell* case, the right to know acts to repeal those sections which protect certain corporate records which have been submitted to and are in the custody of the state of Montana.

It should be made clear that "the right to know" provision is subject to the private rights of individuals, information about whom may be the subject of certain records of a corporation. In this case, a natural person could assert his right and thereby prevent disclosure. This right, however, is one created by the Constitution and not a statutorily vested right.

The bill in Appendix 3 which provides for withholding certain documents clearly exempts corporate documents and repeals all of the sections rendering corporate documents confidential.

#### THE STATUTES PROTECTING THE RECORDS OF CORPORATION

- 3-709 Protects bean dealer record of certain facts as required by statute. (No fine)
- 3-1715 Requires licensed sellers of commercial fertilizers to furnish the state with a confidential statement of the tonnage of each grade of fertilizer. (No fine)
- 3-1721 Protects statements relating to tonnage of each grade of commercial fertilizer sold by persons registering commercial fertilizers. (No fine)
- 5-705 Protects bank reports and statements made to the banking examiner (\$1,000 fine or not to exceed 5 years).
- 5-1012 Protects all records of banks which come under scrutiny of banking examiner (\$1,000 fine or not to exceed 5 years).
- 7-147 Protects records of building and loan association businesses as well as individual borrowers (\$500 fine, 2 to 5 years in prison).
- 40-3660 Protects notices to insurers of noncompliance with insurance rate requirements which may be corrected prior to a hearing.
- 40-5515 Protects registration statements and information derived from insurance commissioner examinations of insurance companies. (No fine)



- 50-1221 Protects information submitted for hard-rock mining permit applications. (No fine)
- 60-144 Protects information submitted to oil and gas commission relating to cores and cuttings of gas on oil wells. (No fine)
- 69-3918 Protects records concerning air contaminant sources furnished to the Board of Health which relate to production on sale figures or processes or production unique to the owner on operation or which tend to adversely affect his competitive position. (No fine)
- 69-4219 Protects information relating to occupational health of employee which might tend to "affect adversely" the "competitive position" of the employer. (No fine)
- 69-4822 Any information concerning sources of water pollution furnished to Board of Department of Health is a matter of public record. However, information unique to the owner or operator which would tend to weaken his competitive position is confidential. (No fine)
- 84-3406 Protects statutorily required records of produce dealers. (No fine)
- 84-6701 Protects records of companies audited by the Department of Revenue under the Multistate Tax Compact. (No fine)

#### CONCLUSION:

The 1972 Constitution created a new relationship between the right to attend public meetings, the right to examine public documents, and the right of individual privacy. The numerous statutes passed before the effective date of the 1972 Constitution could not have and do not address themselves to this new relationship.

Each of these statutes, then, should be amended or repealed and replaced by a new general act which implements and provides definition for the new constitutional provisions.

Presently, the only guideline custodians of documents and holders of meetings have is an Attorney General's opinion, which completely ignores clear constitutional intent as stated in the Convention Debates. It should be noted that this opinion is like any other attorney's opinion, simply a prediction of what a court would decide on the issue. There are, however, some 45 statutes each of which would have to be challenged in court if the legislature does not act. The bills listed in the appendix could be used as a basis from which the legislature can correct a seriously ambiguous situation before the public and the courts are burdened with settlement of the question.



## APPENDIX 1

1 BILL NO.

2 INTRODUCED BY \_\_\_\_\_

3

4 A BILL FOR AN ACT ENTITLED: "AN ACT TO IMPLEMENT ARTICLE  
5 II, SECTION 8 OF THE 1972 CONSTITUTION BY PROVIDING  
6 GUIDELINES FOR CITIZEN PARTICIPATION IN THE OPERATIONS OF  
7 GOVERNMENT AGENCIES."

8

9 BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF MONTANA:

10           Section 1. Legislative intent. The legislature finds  
11   and declares pursuant to the mandate of section 8, article  
12   II of the 1972 Montana Constitution that legislative  
13   guidelines should be established to secure to the people of  
14   Montana their constitutional right to be afforded reasonable  
15   opportunity to participate in the operation of governmental  
16   agencies prior to the final decision of the agency.

17           Section 2. Definitions. As used in this act:

18           (1) "Agency" means any board, bureau, commission,  
19   department, authority or officer of the state or local  
20   government authorized by law to make rules except:

21 (a) the legislature and any branch, committee or  
22 officer thereof;

23 (b) the judicial branches and any committee or officer  
24 thereof;

25 (c) the governor, except that an agency is not exempt



1 because the governor has been designated as a member  
2 thereof;

3 (d) the state military establishment and agencies  
4 concerned with civil defense and recovery from hostile  
5 attack.

6 (e) elected officials of local government when acting  
7 in a legislative capacity.

8 (2) "Rule" means any agency regulation, standard or  
9 statement of general applicability that implements,  
10 interprets, or prescribes law or policy or describes the  
11 organization, procedures, or practice requirements of any  
12 agency. The term includes the amendment or repeal of a  
13 prior rule, but does not include:

14 (a) statements concerning only the internal management  
15 of an agency and not affecting private rights or procedures  
16 available to the public;

17 (b) declaratory rulings as to the applicability of any  
18 statutory provision or of any rule;

19 (c) intra-agency memoranda.

20 Section 3. Agency requirements. (1) Before an agency  
21 makes a decision adopting a rule or policy, awarding a  
22 contract, granting or denying a permit, license, change of  
23 rate or otherwise deciding an issue of interest to the  
24 public, the agency shall provide for, encourage, and assist  
25 public participation to the fullest extent practicable which



1 shall include, but not be limited to:

2 (a) reasonable notice of its intended action;

3 (b) a method of affording interested persons  
4 reasonable opportunity to submit data, views or arguments,  
5 orally or in writing prior to the final decision of the  
6 agency.

7 (2) Each agency shall adopt guidelines for its  
8 programs, which guidelines shall provide policies and  
9 procedures to facilitate public participation in those  
10 programs, consistent with subsection (1) of this section.  
11 These guidelines shall be adopted as rules and published in  
12 a manner which may be provided to a member of the public  
13 upon request.

14 Section 4. Enforcement. No agency decision is valid or  
15 effective against any person or party whose rights have been  
16 prejudiced by an agency's failure to comply with this act.  
17 The district courts of the state have jurisdiction to set  
18 aside an agency decision under this act upon petition of the  
19 aggrieved party made within ninety (90) days of the date of  
20 the decision.

-End-



# ENVIRONMENTAL PROTECTION AGENCY REGULATIONS ON PUBLIC PARTICIPATION IN WATER POLLUTION CONTROL

(40 CFR 105, 38 FR 22756, August 23, 1973)

## PART 105—PUBLIC PARTICIPATION IN WATER POLLUTION CONTROL

- Sec.
- 105.1 Scope.
- 105.2 Policy and objectives.
- 105.3 Required program and reports.
- 105.4 Guidelines for agency programs.
- 105.5 Guidelines for reporting.
- 105.6 Guidelines for evaluation.
- 105.7 Guidelines for public hearings.
- 105.8 Coordination and non-duplication.
- 105.9 Applicability.

**AUTHORITY.**—Sec. 101(e), Federal Water Pollution Control Act (Sec. 2, Federal Water Pollution Control Act Amendments of 1972, Public Law 92-500; 86 Stat. 816; 33 U.S.C.).

### § 105.1 Scope.

This part sets forth minimum guidelines for public participation in the processes of development, revision and enforcement of any regulation, standard, effluent limitation, plan or program under the Federal Water Pollution Control Act, as amended (Public Law 92-500; 86 Stat. 816; 33 U.S.C. 1251), in accordance with section 101(e) of the Act. This part is applicable to all Environmental Protection Agency (EPA) components concerned with the Federal Water Pollution Control Act, including EPA Headquarters program offices and divisions, and EPA Regional Offices, and to States and interstate agencies. These guidelines contain general requirements applicable to regulations, standards, effluent limitations, plans and programs. More specific requirements applicable in specific areas are contained in existing regulations on Public Information (Part 2 of this chapter) and in other regulations that have been or will be issued pertaining to various specific programs under the Act, as well as State and local laws pertinent to the subject.

### § 105.2 Policy and Objectives.

Participation of the public is to be provided for, encouraged, and assisted to the fullest extent practicable consistent with other requirements of the Act in Federal and State government water pollution control activities. The major objectives of such participation include greater responsiveness of governmental actions to public concerns and priorities, and improved popular understanding of official programs and actions. Although the primary responsibility for water quality decision-making is vested by law in public agencies at the various levels of government, active public involvement in and scrutiny of the intergovernmental decision-making process is desired to accomplish these objectives. Cooperation with the public after a final agency deci-

sion has been made will not meet the requirements of this part. The intent of these regulations is to foster a spirit of openness and a sense of mutual trust between the public and the State and Federal agencies in efforts to restore and maintain the integrity of the Nation's waters.

### § 105.3 Required Program and Reports.

Each agency cited in § 105.1 carrying out activities under the Act shall provide for and conduct a continuing program for public participation comprising substantially the elements listed in § 105.4. Staff responsibility and budgetary provisions shall be identified for such program in the administration element of the annual State program submission under Part 35 Subpart B of this chapter. Public participation activities shall be reported on annually and in relation to certain documents and actions as called for in § 105.5.

### § 105.4 Guidelines for Agency Programs.

The continuing agency program for public participation shall contain mechanisms or activity for each of the elements listed in this section. The exact mechanism and extent of activity may vary in relation to resources available, public response, and the nature of issues involved.

(a) **Informational Materials.**—Each agency shall provide continuing policy, program, and technical information at the earliest practicable times and at places easily accessible to interested or affected persons and organizations so that they can make informed and constructive contributions to governmental decision-making. News releases, newsletters and other publications may be used for this purpose. Special efforts shall be made to summarize complex technical materials for public and media use.

(b) **Assistance to Public.**—Each agency shall have an arrangement for providing technical and informational assistance to public groups for citizen education, community workshops, training, and dissemination of information to communities. Requests for information shall be promptly handled.

(c) **Consultation.**—Each agency shall have standing arrangements for early consultation and exchange of views with interested or affected persons and organizations on development or revision of plans, programs, or other significant actions prior to decision-making. Advisory groups, ad hoc committees, or workshop sessions may serve this purpose.

(d) **Notification.**—Each agency, for its

appropriate geographic area, shall maintain a current list of interested persons and organizations, including any who ask to be on such list, for the periodic distribution of materials in paragraph (a) of this section. Each agency shall additionally comply, in connection with any public hearing or other proposed action, with any formal or specific requirements for public notice called for in the Act or in other regulations, to be supplemented wherever possible with informal notice to all interested persons or organizations having requested in advance such notice.

(e) **Access to Information.**—Each agency shall provide, either directly or through others, in an appropriate location or locations, one or more central public collections or depositories of water quality reports and data pertinent to the geographic area concerned. Examples of the materials available for public reference could include grant and permit applications, permits, effluent discharge information, compliance schedule reports, and materials specified in section 308(b) of the Act. Copying facilities at reasonable cost shall be available.

(f) **Enforcement.**—Each agency shall develop internal procedures for receiving and ensuring proper consideration of information and evidence submitted by citizens. Public effort in reporting violations of water pollution control laws shall be encouraged, and the procedures for such reporting shall be set forth by the agency. Alleged violations shall be promptly investigated by the agency.

(g) **Legal Proceedings.**—Each agency shall provide full and open information on legal proceedings under the Act, to the extent not inconsistent with court requirements, and where such disclosure would not prejudice the conduct of the litigation. Actions of the Environmental Protection Agency shall support and be consistent with the Statement of Policy issued by the Department of Justice with regard to affording opportunities for public comment before the Department of Justice consents to a proposed judgment in an action to enjoin dischargers of pollutants into the environment. (See Title 28, Code of Federal Regulations, Chapter 1, § 50.7.)

(h) **Rule Making.**—In addition to providing an opportunity for public hearings on proposed regulations, where appropriate or required under applicable statutes or regulations, agencies shall invite, receive, and consider comments in writing from any interested or affected persons and organizations. All such comments shall be part of the public record.



and a single copy of each comment shall be routinely available for public inspection. Notices of proposed rule making, as well as final rules and regulations, shall be distributed to interested or affected persons as quickly as possible after publication. Each notice of proposed rule making shall include information as to the availability of the full texts of proposed rules and regulations (where these are not set forth in the notice itself) and as to the designated places where copying facilities shall be available at reasonable cost to the public.

(f) *Other Measures*.—The listing of specific measures in this section shall not preclude additional techniques for obtaining, encouraging, or assisting public participation.

#### § 105.5 Guidelines for Reporting.

The annual report of each EPA unit or office, and the annual State program submission under Section 106 of the Act as required under Part 35 of this Chapter, shall include a description of public participation provisions and activities. In addition, and in order that the public and reviewing or approving officials may be fully aware of the actual extent of public input and involvement, a Summary of Public Participation related to particular actions or documents shall be publicly presented as follows:

(a) In the case of regulations and standards required to be published by the Administrator in the *Federal Register* or required to be published by a State agency in an official form, the Summary of Public Participation shall be published as part of the introductory material.

(b) In the case of Statewide or area-wide plans or portions thereof (including the continuing planning process under section 303(e) of the Act and plans developed under such process), or comparable matters required to be approved by the Administrator, the Summary of Public Participation shall be submitted as a part of the plan or of the public transmittal document.

(c) In the case of applications for grants for construction projects other than those under section 206 of the Act, or for planning or annual program grants (including grants under sections 102(c), 106, and 208 of the Act), the Summary of Public Participation shall be a part of the application.

(d) Each Summary of Public Participation shall describe the measures taken by the agency to provide for, encourage, and assist public participation in relation to the matter; the public response to such measures; and the disposition of significant points raised.

#### § 105.6 Guidelines for Evaluation.

The Administrator, Regional Administrator, or other approving official shall review and evaluate each Summary of Public Participation in relation to the

matter submitted. He may call for additional information, or for the records of meetings or hearings. If he finds that there has been inadequate opportunity for public participation on the matter, he may disapprove or suspend action; or alternatively take measures, or require the sponsoring agency to take measures, to obtain additional public participation, prior to final action. Such final action shall include a statement of findings in regard of public participation.

#### § 105.7 Guidelines for Public Hearings.

Any public hearing, whether mandatory or discretionary, to be held under the Act shall be in conformity with this section. If conflict exists between the minimum guidelines of this section and requirements of State or Federal law or other regulations pertaining to a particular hearing, the more stringent requirements shall be observed.

(a) *Purpose*.—Generally, a public hearing gives persons and organizations a formal opportunity to be heard on a matter prior to decision-making. Although public hearing testimony may focus on the prospective action to be taken in the form of a tentative plan or decision, the final actions shall benefit from and reflect consideration of the public hearing content.

(b) *Public Meetings*.—Agencies are encouraged to hold public meetings or workshops, jointly where feasible, on significant matters or proposed actions. Such meetings shall not supplant public hearings when such are required, and shall be informational in nature with opportunity for public response.

(c) *Opportunity for Hearings*.—Where the opportunity for public hearing is called for in the Act, and in other appropriate instances, a public hearing shall be held if the hearing official finds significant public interest (including the filing of requests or petitions for such hearing) or pertinent information to be gained. Instances of doubt should be resolved in favor of holding the hearing, or if necessary, of providing alternative opportunity for public participation.

(d) *Hearing Notices*.—In addition to any other formal legal requirements, a notice of each hearing or public meeting shall be well publicized and be mailed to interested or affected persons and organizations as soon as the hearing or meeting is scheduled by the agency and in the case of a hearing, at least thirty calendar days before the hearing is to take place. If it should be necessary to allow less than thirty days' notice prior to a hearing, the hearing notice shall state the reasons for such shorter time period.

(e) *Location and Time*.—In determining the locations and times for hearings, consideration shall be given to easing travel hardship and to facilitating attendance and testimony by a cross-section

of interested or affected persons and organizations. Accessibility of hearing sites by public transportation shall be considered.

(f) *Documents*.—Reports, documents, and data to be discussed at the public hearing shall be available to the public for a reasonable time prior to the hearing. For complex matters, a Fact Sheet outlining major issues, tentative staff determinations if appropriate, bibliography, and procedures for obtaining further information, for requesting a public hearing, and for other appropriate actions shall be prepared and its availability made known in the notice called for in paragraph (d) of this section.

(g) *Agenda*.—The elements of the public hearing, proposed time schedule, and any constraints on statements shall be specified in the notice of the hearing.

(h) *Scheduling*.—Witnesses at public hearings shall be scheduled in advance when necessary to ensure maximum participation and allotment of adequate time for testimony, provided that such scheduling is not used as a bar to unscheduled testimony. Blocks of time shall be considered for major categories of witnesses. Evening and weekend schedules shall be considered.

(i) *Statements*.—Public hearing procedures shall not inhibit free expression of views by requirements of more than one legible copy of any statement submitted, or for qualification of witnesses beyond that needed for identification.

(j) *Records*.—A record of public hearing proceedings shall be made promptly available to the public at cost.

#### § 105.8 Coordination and Non-Duplication.

In accordance with the policy of section 101(f) of the Federal Water Pollution Control Act, public participation activities and materials required under the Act or these regulations may be combined with closely related programs or activities of the agencies concerned, wherever such combination will enhance the economy, the effectiveness, or the timeliness of the effort, enhance the clarity of the issue, and not be detrimental to participation by the widest possible public. Hearings and meetings may be held jointly by more than one agency on the same matter under the Act, where such procedure does not conflict with other provisions. Interstate agencies particularly are encouraged to develop combined proceedings on behalf of the States concerned.

#### § 105.9 Applicability.

The provisions of this part shall apply only to actions taken after the effective date of this part.



## APPENDIX 2

1 BILL NO. \_\_\_\_\_

2 INTRODUCED BY \_\_\_\_\_

3

4 75-6127, 82-3402

5

6 A BILL FOR AN ACT ENTITLED: "AN ACT TO IMPLEMENT SECTION 9,  
7 ARTICLE II OF THE 1972 MONTANA CONSTITUTION TO ASSURE THAT  
8 NO PERSON SHALL BE DEPRIVED OF THE RIGHT TO OBSERVE THE  
9 DELIBERATIONS OF ALL PUBLIC BODIES, EXCEPT IN CASES IN WHICH  
10 THE DEMAND OF INDIVIDUAL PRIVACY CLEARLY EXCEEDS THE MERITS  
11 OF PUBLIC DISCLOSURE; AND REPEALING SECTIONS 75-6127 AND  
12 82-3402, R.C.M. 1947."

13

14 BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF MONTANA:

15           Section 1. Definitions. As used in this act:

16           (1) "Deliberations" means all meetings of two (2) or  
17 more members of any public body at which any public business  
18 is discussed, or at which any formal action is taken by such  
19 body.

20           (2) "Public body" means any board, bureau, committee,  
21 commission or other policy making body of state government  
22 and its subdivisions or organizations or agencies supported  
23 in whole or in part by public funds or expending public  
24 funds, except that the supreme court, when not in session is  
25 not a public body nor is a political caucus of the



1 legislature a public body.

2 Section 2. Deliberations of public bodies to be open  
3 to the public. All deliberations of a public body shall be  
4 open to the public at all times, except as otherwise  
5 provided in section 6 of this act.

6 Section 3. Notice. Any deliberation at which the  
7 adoption of any formal action occurs or may occur, or at  
8 which a majority or quorum of the body is in attendance,  
9 shall be held only after full and timely notice to the  
10 public. Such notice shall include an agenda briefly  
11 indicating the subject or subjects under consideration by  
12 the body.

13 Section 4. Validity of actions. No formal action of a  
14 public body is valid unless taken or made at a deliberation  
15 that meets the requirements of this act. The district  
16 courts of the state have jurisdiction to set aside an agency  
17 action made in violation of this act, upon petition of any  
18 citizen of this state made within ninety (90) days of the  
19 date of the deliberation.

20 Section 5. Judicial enforcement. The district courts  
21 of the state shall have jurisdiction to enforce the purposes  
22 of this act upon application by any citizen of this state.  
23 The courts are authorized to restrain any deliberation from  
24 taking place in this state if upon a sworn statement from  
25 any citizen there is probable cause that this act will be



1 violated by the public body. A restraining order shall  
2 issue without notice only after the court is satisfied that  
3 there is no means, formal or informal, to hear the arguments  
4 of the respondent agency prior to the meeting or  
5 deliberation.

6 Section 6. Closed meetings. Any public body may choose  
7 a meeting if the deliberation involves a question of  
8 individual privacy in which the demand of individual privacy  
9 clearly exceeds the merits of public disclosure. This  
10 determination and the reasons therefore shall be promptly  
11 recorded and this record shall be open to public inspection.  
12 Such record shall not be so specific as to violate the right  
13 of individual privacy.

14 Section 7. Violations. Any person who attends a  
15 deliberation of a public body of which he is a member, not  
16 held in accordance with the provisions of this act, is  
17 guilty of a misdemeanor and upon conviction shall be fined  
18 not more than five hundred dollars (\$500) or be imprisoned  
19 not more than six (6) months or be both fined and  
20 imprisoned.

21 Section 8. Sections 75-6127 and 82-3402, R.C.M. 1947,  
22 are repealed.

-End-



## APPENDIX 3

1 \_\_\_\_\_ BILL NO. \_\_\_\_\_

2 INTRODUCED BY \_\_\_\_\_

3

4 3-709, 3-1715, 3-1721, 5-705, 5-1012, 7-147, 10-703,  
5 32-1213, 32-1215, 32-3925, 36-203, 40-3660, 40-5511,  
6 40-5515, 41-803, 48-139, 50-1221, 60-144, 61-213, 69-3918,  
7 69-4115, 69-4219, 69-4610, 69-4822, 69-5218, 69-6301,  
8 69-6303, 71-406, 71-506, 71-607, 71-1207, 71-1403, 71-1520,  
9 71-1523, 84-3406, 84-6701, 87-124, 92-809, 92-1348, 94-9824,  
10 95-2205

11

12 A BILL FOR AN ACT ENTITLED: "AN ACT TO IMPLEMENT SECTION 9,  
13 ARTICLE II OF THE 1972 MONTANA CONSTITUTION TO ASSURE THAT  
14 NO PERSON SHALL BE DEPRIVED OF THE RIGHT TO EXAMINE  
15 DOCUMENTS OF ALL PUBLIC BODIES, EXCEPT IN CASES INVOLVING  
16 INDIVIDUAL PRIVACY; AND REPEALING SECTIONS 3-709, 3-1715,  
17 3-1721, 5-705, 5-1012, 7-147, 10-703, 32-1213, 32-1215,  
18 32-3925, 36-203, 40-3660, 40-5511, 40-5515, 41-803, 48-139,  
19 50-1221, 60-144, 61-213, 69-3918, 69-4115, 69-4219, 69-4610,  
20 69-4822, 69-5218, 69-6301, 69-6303, 71-406, 71-506, 71-607,  
21 71-1207, 71-1403, 71-1520, 71-1523, 84-3406, 84-6701,  
22 87-124, 92-809, 92-1348, 94-9824 AND 95-2205, R.C.M. 1947."

23

24 BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF MONTANA:

25 Section 1. Definitions. As used in this act:



(1) "Individual" means a natural person;

(2) "Documents" mean any writing, other than draft writings which are not considered by the writer to be a finished product;

(3) "Public body" means any board, bureau, committee, commission or other policy making body of state government and its subdivisions.

Section 2. Documents open to inspection. All documents of any public body shall be open to public inspection during the normal working hours of the public body except as provided in section 3 of this act.

Section 3. When documents may not be disclosed. The custodian of a document may choose not to disclose a document only if he determines that

(1) the document contains personal information about an individual, information of a nature that the individual has given the information to the custodian with the expectation that it will be kept confidential and

(2) the information contained in the document relates to the privacy of an individual and the demand of privacy of that individual clearly exceeds the merits of public disclosure.

Section 4. Notice to individual mentioned in document. If the custodian of a document chooses to disclose a document relating to the privacy of an individual, after



1 making the determination required in section 3, he must  
2 first notify the individual involved that he intends to  
3 disclose the document.

4 The individual has five (5) days from the day he  
5 receives notice to acquire judicial review under section 5,  
6 if he does not wish the document to be disclosed. If upon  
7 application the court finds that the demands of individual  
8 privacy clearly exceed the merits of public disclosure, it  
9 shall order the custodian not to disclose the document. If  
10 he does not apply for a court determination within that  
11 time, the custodian may disclose the document.

12 Section 5. Judicial review. Any determination made by  
13 the custodian of a document is subject to judicial review  
14 upon application by any citizen of this state. If, upon  
15 application, a court determines that the demands of  
16 individual privacy do not clearly exceed the merits of  
17 public disclosure they shall order the custodian to make the  
18 document available to public inspection.

19 Section 6. Sections 3-709, 3-1715, 3-1721, 5-705,  
20 5-1012, 7-147, 10-703, 32-1213, 32-1215, 32-3925, 36-203,  
21 40-3660, 40-5511, 40-5515, 41-803, 48-139, 50-1221, 60-144,  
22 61-213, 69-3918, 69-4115, 69-4219, 69-4610, 69-4822,  
23 69-5218, 69-6301, 69-6303, 71-406, 71-506, 71-607, 71-1207,  
24 71-1403, 71-1520, 71-1523, 84-3406, 84-6701, 87-124, 92-809,  
25 92-1348, 94-9824 and 95-2205, R.C.M. 1947, are repealed.

-End-



State of Montana  
Office of The Attorney General  
Helena 59601

ROBERT J. WOODALL  
ATTORNEY GENERAL

VOLUME NO. 35

Opinion No. 19

ENVIRONMENT - Impact statements, application information under Hard Rock Mining Act not included; MINES AND MINING - Confidentiality, hard rock mining applications; MINES AND MINING - Hard rock mining applications, confidentiality of; STATUTES - Confidentiality, hard rock mining applications. Article II, section 9, Constitution of Montana, 1972; section 50-1221, R.C.M. 1947.

HELD: 1. The Montana statute providing for confidential applications under the Hard Rock Mining Act is constitutional under Article II, section 9, Montana Constitution, 1972.

2. Confidential information contained in an application to the department for a hard rock mining permit cannot be made public through an environmental impact statement.

August 7, 1973

Mr. Ted Schwinden, Commissioner  
Department of State Lands  
State Capitol  
Helena, Montana 59601

Dear Mr. Schwinden:

You have requested my opinion on the following questions:

1. What is the status of the confidentiality provision of the Hard Rock Mining Reclamation Act (section 50-1221, R.C.M. 1947) in light of the Right to Know section of the new Montana Constitution (Article II, section 9)?



August 7, 1973

2. May the information in an application for a mining permit or license under section 50-1221, R.C.M. 1947, be made public through the environmental impact statement required by the Montana Environmental Policy Act, section 69-6504, R.C.M. 1947?

Courts, both state and federal, have long recognized the power of the government to enact specific legislation requiring that certain documents and records remain confidential. Myrland v. Warner, 240 F. 310, and Boske v. Comington, 177 U.S. 459. In construing such legislation, the courts have held that the wisdom and policy of a state statute forbidding disclosure of information, records or documents must be conclusively assumed, and where statutory language is clear, legislative pronouncement must be given full effect. In re Reid, 155 F. 933, and Tax Commission v. Clendinning, 193 Okla. 271, 143 P.2d 143.

Although there is no Montana case directly in point, these general principles of law apparently have been accepted and applied in Montana. State ex rel. Powell v. State Bank, 90 M. 530, 4 P.2d 717. A considerable number of statutes preserving the confidentiality of various documents presently exist in the laws of Montana. For instance, hospital reports (section 69-4218, Revised Codes of Montana, 1947), certain records pertaining to adoptions (section 61-213, R.C.M. 1947), personal income tax records (section 84-4931, R.C.M. 1947), accident reports (section 32-1213, R.C.M. 1947), and many other documents are shielded from public view.

This opinion will focus upon the effect of Article II, section 9 of the new Montana Constitution on existing confidentiality statutes, and in particular the confidentiality provision of the Hard Rock Mining Act. Article II, section 9, *supra*, provides:

"Right to Know. No person shall be deprived of the right to examine documents or to observe the deliberations of all public bodies or agencies of state government and its subdivisions, except in cases in which the demand of individual privacy clearly exceeds the merits of public disclosure." (Emphasis supplied)

The expressed purpose of this provision was to constitutionally provide public access to government documents and operations. However, the Constitutional Convention Bill of Rights proposal on the right to know specifically proclaimed:

"The Committee intends by this provision that the right to know not be absolute. The right of individual privacy is to be fully respected in any statutory embellishment of the provision as well as in the court decisions that will interpret it. To the extent that a violation of individual privacy outweighs the public right to



August 7, 1973

know, the right to know does not apply." Montana Constitutional Convention, Bill of Rights Proposal, No. VIII, p. 23. (Emphasis supplied)

It is evident from this statement that section 9 was not intended to open all documents to public scrutiny. The drafters recognized the right of the legislature to promulgate provisions, consistent with section 9, respecting individual privacy. To the extent, then, that confidentiality statutes conform to Article II, section 9, they are constitutional, and in full force and effect.

Section 50-1221, R.C.M. 1947, provides:

"Any and all information obtained by the board or by the director or his staff by virtue of applications for licenses or permits is confidential between the board and the applicant. Any information obtained by the board or by the director or his staff by virtue of applications for licenses or permits is, however, properly admissible in any hearing conducted by the director, the board, appeals board or in any judicial proceeding to which the director and the applicant are parties. Failure to comply with the secrecy provisions of this act shall be punishable by a fine of up to ten thousand dollars (\$10,000) or one (1) year in jail."

As discussed supra, the constitutional provision on the right to know expressly provides for exceptions, and is subject to the demands of individual privacy. The confidentiality section of the Hard Rock Mining Act can be construed to fit within this exception. Legislative intent that applications for mining permits and licenses merited confidential protection is evident from the strict penalty clause in that provision, "Failure to comply with the secrecy provisions of this act shall be punishable by a fine of up to ten thousand dollars ... or one (1) year in jail." Thus, there has been a legislative determination that in this particular instance the merits of public disclosure are outweighed by the need for privacy.

Section 50-1221, supra, was a duly and regularly adopted act of the legislature, and a general principle of law is that statutes are presumed to be constitutional. State Highway Commission v. Chapman, 152 M. 79, 446 P.2d 709 (1968). Furthermore, a statute will not be declared unconstitutional unless conflict with the constitution is beyond a reasonable doubt, and will be upheld if possible. Harvey v. Blewitt, 151 M. 247, 443 P.2d 902 (1968).

In view of the express exception provided for in Article II, section 9, relative to individual privacy, legislative determination of meritorious privacy, and construction of statutes in favor of constitutionality, section 50-1221, supra, does, in my opinion, conform to the right to know provision of the new constitution.



August 7, 1973

In construing Article II, section 9, consideration must be given to the meaning of the term "individual". The phrase "individual privacy" referred to therein must be interpreted in order to delineate those parties to whom the term applies.

The word "individual", while sometimes used to refer only to a natural person, is broad enough to include corporations unless the context in which it is used indicates otherwise. Accounting Co. v. Dorman, 11 F. Supp. 872. The language of section 9 gives no indication as to any particular or specific interpretation of the term. The ordinary dictionary meaning of individual is "a single member of a category, a particular person or thing." Webster's Third New International Dictionary. Case law provides that individual may be construed to be used in the sense of person, but also embraces artificial or corporate persons as well as natural. State v. Bell Telephone Co., 36 Ohio St. 310, 38 Am.Rep. 583. Section 19-103, R.C.M. 1947, defines the word "person" as including a corporation. The Montana Supreme Court has held that the construction of a word in the constitution which has been defined by the legislature should have considerable weight in determining the meaning of the term. Northern Pacific Ry. Co. v. Mjelde, 48 M. 287, 137 P. 386.

Applying these general principles, the word "individual" in section 9 refers to corporate privacy as well as a natural person's privacy. To hold otherwise would open the door to many statutorily protected confidential areas. Bidding on state contracts (section 82-1131), executive sessions (section 82-3402), certain bank reports and records (section 7-147), and corporate license tax records (section 84-1507) are examples. Thus, corporations applying for permits under the Hard Rock Mining Act can avail themselves of the "individual" privacy exception provided for in the right to know section of the constitution.

The Montana Environmental Policy Act (MEPA), section 69-6504, R.C.M. 1947, requires that state agencies prepare environmental impact statements on actions of state government which significantly affect the quality of the human environment. However, MEPA provides that impact statements be made available to the public and such statements will of necessity contain material obtained from the application for an operating permit. Section 50-1221, supra, provides that all information submitted in applications for permits is confidential and, thus, may not be used for the preparation of impact statements.

THEREFORE, IT IS MY OPINION that:

1. Section 50-1221, R.C.M. 1947, relating to confidentiality of hard rock mining applications, does not violate Article II, section 9 of the Montana Constitution, and the statute remains in full force and effect; and

2. Section 50-1221, R.C.M. 1947, providing for confidanti-



Mr. Ted Schwinden

-5-

August 7, 1973

ality of information contained in hard rock mining applications,  
precludes the department from making such information public  
through an environmental impact statement.

Very truly yours,



ROBERT L. WOODAHL  
Attorney General

RLW:dm





